

In either late summer or early fall 1998, the claimant found employment and began earning wages that were comparable to those which she was earning on the date of her accident. Because of that change in wages and the resulting change in the permanent

partial general disability, the respondent and its insurance carrier then requested that the initial Award be reviewed and modified.

By Award dated July 30, 1999, the Judge modified the permanent partial general disability and decreased it from 65 percent to 21 percent, which was the whole body functional impairment rating. Following the review and modification statute,¹ the Judge found that the effective date of the change in the disability rating should be December 16, 1998, which is six months before the request for review and modification was filed. Computing the benefits due in this claim, the Judge determined that claimant was entitled to receive 50.29 weeks of temporary total disability benefits and 79.84 weeks of permanent partial disability benefits.

Claimant contends Judge Frobish erred in computing the number of weeks of permanent partial disability that she should receive. Although claimant argues that the issue is the appropriate date for the modification of the Award, claimant's arguments actually go to the method used to recompute benefits when there is a change in the permanent partial disability rating.

The only issue before the Appeals Board on this review is whether the Judge properly computed the number of weeks of permanent partial disability benefits that claimant is entitled to receive due to the decrease in the percentage of permanent partial general disability from 65 percent to 21 percent effective December 16, 1998.

FINDINGS OF FACT

After reviewing the record compiled to date, the Appeals Board finds:

1. Ms. Walz sustained a work-related accidental injury on March 10, 1997, while working for Casco, Inc. After the accident, Ms. Walz did not return to work for Casco, Inc., and had difficulty finding other employment.
2. In an Award dated August 18, 1998, the Judge awarded Ms. Walz 50.29 weeks of temporary total disability benefits followed by a 65 percent permanent partial general disability. The 65 percent permanent partial general disability was based upon a 100 percent difference in pre- and post-injury wages and a 30 percent task loss. The Judge also found that, because of the accident, Ms. Walz sustained a 21 percent whole body functional impairment.
3. Casco, Inc., and its insurance carrier appealed the Award to the Appeals Board. The Board affirmed the Award in an Order dated March 22, 1999.

¹ K.S.A. 44-528.

4. On June 16, 1999, Casco, Inc., and its insurance carrier filed their request for review and modification of the August 1998 Award.

5. At the July 13, 1999 review and modification hearing, the parties represented that on or about September 1, 1998, Ms. Walz began working for another employer earning a wage that was comparable to, or at least within 90 percent of, the wages that she was earning on the date of the March 1997 accident.

CONCLUSIONS OF LAW

1. The effective date for modifying an award based upon a change of the functional impairment rating or work disability rating is the date of the change, except the effective date cannot be more than six months before the application for review and modification was filed. The Workers Compensation Act provides:

Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.²

2. Casco, Inc., and its insurance carrier filed their request for review and modification on June 16, 1999. Six months before that date is December 16, 1998, which, under the provisions of the above-quoted statute, would be the earliest date for modifying Ms. Walz's permanent partial general disability.

3. The Appeals Board agrees with the Judge that the effective date of any change in Ms. Walz's award should be December 16, 1998, as she was working as of that date and earning a comparable wage. Therefore, her permanent partial general disability had changed.

4. Because Ms. Walz sustained an "unscheduled" injury, her permanent partial general disability rating is determined by the formula set forth in K.S.A. 1996 Supp. 44-510e. That statute provides:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference

² K.S.A. 44-528(d).

between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

5. As Ms. Walz is now earning at least 90 percent of the wages that she was earning at the time of her March 1997 accident, her permanent partial general disability is limited to her 21 percent whole body functional impairment rating.

6. Based upon the above, the Award should be modified to award Ms. Walz the following benefits for the following periods and ratings:

(I) 50.29 weeks of temporary total disability benefits.

(II) For the period from February 26, 1998, through December 15, 1998, Ms. Walz had a 65 percent permanent partial general disability. For that period Ms. Walz is entitled to receive 41.86 weeks of permanent partial general disability benefits.

(III) Commencing December 16, 1998, Ms. Walz has a 21 percent permanent partial general disability and is entitled to receive an additional 37.88 weeks of permanent partial general disability benefits.

7. Ms. Walz contends that for the period commencing December 16, 1998, she should be entitled to receive 70.16 weeks of permanent partial general disability benefits rather than the 37.88 found above. It appears that Ms. Walz computes the weeks due at the 21 percent disability rating by subtracting from 415 both 35.29 weeks of temporary total disability benefits³ and 45.43 weeks of permanent partial disability benefits that represent the period before December 16, 1998 that Ms. Walz had a 65 percent disability rating. That computation yields 334.28 weeks ($415 - 35.29 - 45.43 = 334.28$). It appears that Ms. Walz then multiplies 334.28 by the new 21 percent disability rating, which yields, according to Ms. Walz's computations, 70.16 weeks.⁴ But the Appeals Board disagrees with that formula.

³ (50.29 weeks - 15 weeks = 35.29)

⁴ Applying that formula to the number of weeks of temporary total and permanent partial disability benefits specified in Ms. Walz's brief to the Appeals Board, the actual number of weeks yielded is 70.2 ($334.28 \times 21\% = 70.2$), which is close enough to conclude that the above formula is the one being suggested by Ms. Walz.

8. The method adopted by the Appeals Board is to recompute the number of weeks of permanent partial disability benefits by first subtracting the appropriate number of weeks of temporary total disability benefits from 415, the maximum number of weeks that can be awarded for a 100 percent permanent partial general disability. In this instance that number is 379.71 ($415 - 35.29 = 379.71$). The remainder is then multiplied by the new disability rating. Here, the number produced is 79.74 ($379.71 \times 21\% = 79.74$). Therefore, 79.74 is the maximum number of weeks that a 21 percent impairment produces. But as Ms. Walz had already received, by our computations, 41.86 weeks of benefits because of the initial 65 percent rating, there are only 37.88 weeks remaining to be paid on the award.

9. The Workers Compensation Act and the Kansas Administrative Regulations are silent as to how to recompute an award when the disability rate changes. The Appeals Board has considered several methods and has adopted one which tends to award workers equivalent benefits when their ratings, and the number of weeks at those ratings, are equivalent. Also, the Appeals Board questions any method of computation that awards workers whose disability ratings decrease more than workers whose disability ratings do not decrease during the 415-week period following their accident.

10. The computation suggested by Ms. Walz produces inequitable results. For example, injured workers who have a work disability continuously throughout the period of their claims receive less weeks of permanent partial disability benefits than workers whose disability ratings decrease because they return to work earning comparable wages. We do not believe that the legislature intended such a result. See the following examples:

Worker A is entitled to receive 30 weeks of temporary total disability benefits followed by a 50 percent permanent partial general disability. As indicated below, this worker is entitled to receive 200 weeks of permanent partial disability benefits.

1. Subtract the number of weeks of temporary total disability benefits that exceeds 15 weeks.
415 weeks maximum for both temporary total and permanent partial general disability benefits
- 15 temporary total weeks = 400 weeks maximum for permanent partial general disability benefits.⁵
2. Multiply the maximum weeks determined above by the permanent partial general disability rating.
400 weeks \times 50 percent rating = 200 weeks of permanent partial general disability benefits.
Therefore, Worker A receives 200 weeks of

⁵ K.S.A. 1996 Supp. 44-510e(a)(2).

permanent partial general disability benefits.

Worker B is entitled to receive 30 weeks of temporary total disability benefits followed by a 50 percent permanent partial general disability that lasts 200 weeks, followed by a 10 percent permanent partial disability that also lasts 200 weeks. As indicated below, Ms. Walz's computation method would award Worker B 220 weeks of permanent partial disability benefits, or 20 weeks more than Worker A, as shown above, who had the higher disability rating for the longer period and whose loss is theoretically greater. But the Appeals Board's method awards Worker B the same 200 weeks that Worker A receives, which results because of the rapid payout method now set forth in the Act.⁶

Ms. Walz's computation method:

1. Subtract the appropriate number of weeks of temporary total disability benefits.
 $415 \text{ weeks} - 15 \text{ temp. total weeks} = 400 \text{ weeks}.$
2. Multiply the number obtained above by the first disability rating.
 $400 \text{ weeks} \times 50 \text{ percent rating} = 200 \text{ weeks},^7$
which Worker B is entitled to receive for the 50 percent disability rating that lasted 200 weeks.
3. When the disability rating changes, recompute the benefits due by subtracting from the maximum number of permanent partial disability benefits the number of weeks the earlier disability rating lasted.
 $400 \text{ weeks} - 200 \text{ weeks} = 200 \text{ weeks}.$
4. Multiply the number obtained above by the new disability rating.
 $200 \text{ weeks} \times 10 \text{ percent rating} = 20 \text{ weeks}.$
5. Combine the weeks due at the different ratings.
 $200 \text{ weeks} + 20 \text{ weeks} = 220 \text{ weeks total of permanent partial general disability benefits}.$

⁶ K.S.A. 1996 Supp. 44-510e(a)(3).

⁷ This number is also limited by the actual number of weeks of benefits that the worker remained at that disability rating.

The Appeals Board's method:

1. Subtract the appropriate weeks of temporary total disability benefits.
 $415 \text{ weeks} - 15 \text{ temp. total weeks} = 400 \text{ weeks}.$
2. Determine the number of weeks due at the first disability rating.
 $400 \text{ weeks} \times 50 \text{ percent rating} = 200 \text{ weeks}$, which is limited by the total number of weeks that the worker remained at that disability rating.
3. Recompute the maximum award based upon the new disability rating.
 $400 \text{ weeks} \times 10 \text{ percent rating} = 40 \text{ weeks}.$
4. Because a 10 percent rating entitles Worker B to receive a maximum of 40 weeks of permanent partial general disability benefits, because of the rapid payout of the 50 percent rating, no additional weeks of permanent partial disability benefits are payable when the disability falls to 10 percent as the maximum award has been satisfied.
5. Add the weeks of permanent partial disability benefits from the different ratings.
 $200 \text{ weeks} + 0 \text{ weeks} = 200 \text{ weeks total}.$
Therefore, Worker B receives a total of 200 weeks of permanent partial general disability benefits.

The following examples also demonstrate the incongruous results created by Ms. Walz's proposed computation method. In the following examples Worker C's permanent partial general disability rating is 10 percent for 200 weeks followed by a 50 percent disability rating for the remaining 200 weeks. As indicated below, Ms. Walz's method awards Worker C a total of only 140 weeks of permanent partial disability benefits, which is less than the 220 weeks that Worker B would be entitled to receive despite the fact that both workers had a 10 percent disability for 200 weeks and 50 percent disability for 200 weeks. Theoretically, their benefits should be equal but they are not. Compare that incongruous result to the Appeals Board's method, which awards Worker C 200 weeks of permanent partial general disability benefits, the same number of weeks awarded Worker B.

Ms. Walz's proposed method:

1. $415 \text{ weeks} - 15 \text{ temp. total weeks} = 400 \text{ weeks}.$

2. $400 \text{ weeks} \times 10 \text{ percent rating} = 40 \text{ weeks}$ for that 200-week period that Worker C had a 10 percent permanent partial general disability.
3. $400 \text{ weeks} - 200 \text{ weeks (the number of weeks that Worker C had a 10 percent rating)} = 200 \text{ weeks}$.
4. $200 \text{ weeks} \times 50 \text{ percent (the new rating)} = 100 \text{ weeks}$ for that period that Worker C had a 50 percent rating.
5. $40 \text{ weeks} + 100 \text{ weeks} = 140 \text{ weeks}$ total of permanent partial general disability benefits.

The Appeals Board's method:

1. $415 \text{ weeks} - 15 \text{ temp. total weeks} = 400 \text{ weeks}$.
2. $400 \text{ weeks} \times 10 \text{ percent rating} = 40 \text{ weeks of benefits}$ for the period that Worker C had a 10 percent rating.
3. When the disability rating increases to 50 percent, the maximum award is computed commencing the effective date of the change.
 $400 \text{ weeks} \times 50 \text{ percent rating} = 200 \text{ weeks}$ maximum for a 50 percent permanent partial general disability.
4. Credit the number of weeks that were due at the earlier disability rating to the number obtained above.
 $200 \text{ weeks} - 40 \text{ weeks} = 160 \text{ weeks}$ for the maximum number of weeks payable while Worker C has a 50 percent disability. This number is also limited by the number of weeks that remain in the award. In this example, 200 weeks remained in the award when the rating changed. Therefore, Worker C is entitled to the entire 160 weeks.
5. Add the weeks payable at the different disability ratings.
 $40 \text{ weeks} + 160 \text{ weeks} = 200 \text{ weeks of permanent partial general disability benefits due Worker C}$.

11. Based upon the above, the Award should be modified as set forth in paragraph six above.

AWARD

WHEREFORE, the July 30, 1999 Award of Review and Modification is modified to correct a minor mathematical error.

Lori K. Walz is granted compensation from Casco, Inc., and its insurance carrier for a March 10, 1997 accident and resulting disability. Based upon an average weekly wage of \$328.77, Ms. Walz is entitled to receive 50.29 weeks of temporary total disability benefits at \$219.19 per week, or \$11,023.07. For the period from February 26, 1998, through December 15, 1998, 41.86 weeks of benefits are due at \$219.19 per week, or \$9,175.29, for a 65 percent permanent partial general disability. For the period commencing December 16, 1998, 37.88 weeks of benefits are due at \$219.19 per week, or \$8,302.92, for a 21 percent permanent partial general disability. The total award due and owing is \$28,501.28, which is ordered paid in one lump sum less any amounts previously paid.

The Appeals Board adopts the remaining orders contained in the Award of Review and Modification to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stephen J. Jones, Wichita, KS
Douglas D. Johnson, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director